



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 19 1998

MEMORANDUM

SUBJECT: Adoption of the Recommendations from the EPA Workgroup
on Tribal Eligibility Determinations

FROM: Robert Perciasepe *Bob Perciasepe*
Assistant Administrator for the National Indian Program

Jonathan Z. Cannon *Jonathan Cannon*
General Counsel

TO: Assistant Administrators
Regional Administrators

In a memorandum dated July 9, 1997, we established an Agency-wide workgroup to review EPA's process for making determinations on tribal applications for EPA-approved regulatory programs. That memorandum noted that "it is vital that the Agency have a clear, well-documented process to assemble and review relevant information, and decide on tribal program applications, in order to assure that the Agency makes sound decisions that can be defended successfully." The Workgroup's charge was to review the Agency's current process for making such determinations and develop recommendations, which might lead to written guidance, for improving the process to ensure reliably defensible decisions.

The Workgroup submitted its recommendations on December 23, 1997. Before making its final recommendations, the Workgroup shared its preliminary recommendations with the Tribal Caucus of the Tribal Operations Committee (the TOC), individual tribes, and EPA offices for their review and comment. The Workgroup's final recommendations have been shared with the EPA senior managers for the Indian Program for their views.

We too have reviewed the recommendations, and considered the comments received regarding the recommendations from within the Agency and from tribes. By this memo, we accept in full the recommendations made by the Workgroup. Below we provide: 1) a summary of the Workgroup process; and 2) a description of the recommendations and a discussion of how each recommendation will be implemented.

When we initiated the review that led to these recommendations, we asked that Regions generally defer making final determinations on tribal applications for regulatory authority until the review was completed. Now that the review is completed, we request that the Regions resume decision-making on tribal applications in accordance with the recommendations and guidance adopted today.

The Workgroup Process

The Workgroup, which was chaired by Robert G. Dreher, Deputy General Counsel, included representatives from all EPA Regions, and a number of headquarters (HQ) offices. The Workgroup developed a list of five issues to be addressed and established issue subgroups to prepare options papers on each issue. A list of Workgroup and Subgroup members is attached as Attachment A. The five issues identified and addressed by the Workgroup were: 1) the process for maintaining and compiling administrative records for EPA determinations on tribal eligibility to run regulatory programs; 2) the appropriate consultation and concurrence role for HQ in these decisions; 3) the application of the Montana test for evaluating tribal authority over non-Indians on fee lands within reservations; 4) opportunities for stakeholder involvement on EPA decisions regarding tribal applications for eligibility to establish water quality standards under the Clean Water Act; and 5) evaluation of treatment in the same manner as state (TAS) criteria for grants.¹

The Workgroup arrived at preliminary recommendations by the middle of October. Workgroup members solicited comments on the options and preliminary recommendations from their respective offices. Then, at the beginning of November, the Workgroup solicited comments on the options and preliminary recommendations from the Tribal Caucus of the TOC and from individual tribes. The Workgroup also provided periodic updates on its progress during the TOC's monthly conference calls.

The Workgroup considered comments from the TOC, individual tribes, and EPA offices. The Workgroup made several changes to the preliminary recommendations to address these comments. Finally, the Workgroup provided its recommendations to us, along with a discussion of the key considerations, comments received, and options evaluated for each issue.

¹ The Workgroup also identified one longer-term issue -- the tribal role under FIFRA -- that the Workgroup recommends the Agency evaluate in the future.

Adoption and Implementation of the Workgroup Recommendations

The primary considerations of the Workgroup were to develop recommendations that will: 1) improve the consistency and legal defensibility of EPA decisions regarding tribal programs; 2) avoid burdensome procedural requirements that may unnecessarily delay decisions on tribal applications; and 3) recognize the importance to tribes and EPA's Indian Program of decisions involving tribal sovereignty. The principal concerns raised by the TOC, tribes, and Regions in their comments on the preliminary recommendations were that the Agency avoid adopting procedures that will place undue burdens and delays on EPA's process for making decisions on tribal applications. The Workgroup considered and made several changes to the preliminary recommendations to address these concerns. We believe that the recommendations adopted below achieve the Workgroup's goal of significantly improving the defensibility of EPA's decisions without placing undue burdens on the decision-making process for tribal applications. To the extent the recommendations place additional burdens on the process, we believe they are warranted in order to ensure that the Agency handles decisions pertaining to tribal sovereignty with the utmost care.

Issue 1 -- Administrative Records: Improving EPA's process for maintaining and compiling administrative records on EPA decisions regarding tribal eligibility to run regulatory programs.

Workgroup Recommendation: The Assistant Administrator (AA) for Water (as the AA for the National American Indian Program) and the Office of General Counsel (OGC) should jointly issue a memorandum providing guidance and establishing docketing procedures specific to the compilation and maintenance of administrative records for EPA determinations on tribal applications for eligibility to run regulatory programs under all relevant EPA statutes. The memorandum should also ask Regions to establish a training program to ensure that the guidance and procedures are followed.

Adoption and Implementation: We adopt this recommendation in full. The final guidance is attached as Attachment B.

Issue 2 -- HQ Role: What concurrence/consultation role should HQ play in EPA decisions regarding tribal eligibility to run regulatory programs?

Workgroup Recommendation: HQ review and concurrence should be required for all nationally-significant matters. Decisions on national significance should be guided by semi-annual review and

consultation meetings between HQ offices (the American Indian Environmental Office (AIEO), OGC, and the national program manager (NPM) offices) and Regions to discuss national concerns/issues and to provide Regions the opportunity to discuss potential upcoming tribal actions/cases.² In all cases, regional-HQ consultation should begin as early as possible, particularly prior to a tribe's application where regional staff believe, based on early involvement with the tribe, that nationally-significant issues may be raised by an application. In addition, to help inform decisions on national significance, Regions should be asked to provide a brief memorandum to HQ assessing the national significance of each tribal application for a regulatory program as applications come into the Region. HQ should be ultimately responsible for determining national significance.

The determination regarding national significance should be made within 30 days of EPA receipt of a tribal application. On applications with nationally-significant issues, an expectation should be established that HQ will concur or provide specific guidance to the Region within 30 days after a Region's tentative decision has been provided to HQ, provided there has been early involvement for HQ. Regions should ensure that a tribe that has applied for eligibility is kept informed of the status of the decision-making process. The process described above should be reevaluated after 3 years.

AIEO, OGC and the relevant national program office are the appropriate HQ offices to be involved in the consultation and concurrence process.

Finally, Regions should have periodic "Round table" discussions with their tribes. Regional Counsel attorneys should have early consultation with tribal attorneys to identify potential legal issues pertaining to tribal eligibility for regulatory programs.

² The Workgroup recommended that there be one meeting involving all Regions and one Region-specific meeting each year. In addition, the Workgroup recommended that existing procedures (e.g., the National Indian Workgroup) be used to improve coordination. Although the scope of the Workgroup's analysis was limited to EPA determinations on tribal eligibility applications for regulatory programs, the Workgroup noted that other pending or possible future Agency actions affecting environmental programs in Indian country (e.g., PSD redesignations, site-specific rulemaking under RCRA) can and should be discussed in these semi-annual meetings.

Adoption and Implementation: We adopt this recommendation in full. Appropriate changes to the Agency's delegations manual will need to be made to implement the HQ concurrence aspects of this recommendation. Bob Perciasepe is initiating appropriate delegations manual changes for Office of Water programs. We have asked the Assistant Administrators for the Office of Prevention, Pesticides, and Toxic Substances and the Office of Air and Radiation to initiate appropriate changes to the delegations manual for their programs. We ask that AIEO consult with those offices and report to us on the status of these delegations manual changes in one month. We ask that regional and HQ offices implement all other aspects of the recommendations outlined above.

We emphasize that the consultation and concurrence process should operate as efficiently as possible. It is essential that HQ and Regions consult early in the process, even before tribal applications are submitted whenever possible. We will reevaluate this process, with input from Regions, NPMS, AIEO and tribes, after three years.

Issue 3 -- Application of the Montana test.

Issue 3a -- Should EPA prepare guidance on applying the Montana impacts test (regarding tribal authority over nonmembers on fee lands within reservations)?

Workgroup Recommendation: The AA for Water (as the AA for the National American Indian Program) and OGC should jointly issue general guidance to EPA regional staff, and request that AIEO work with OGC and the Regions to develop and initiate a training program to supplement the guidance. The training should be conducted in Regions with nonmember fee lands and should allow for discussion of the application of the Montana test and the development of decision documents. Such training should be required for all persons developing decision documents that include an analysis under the Montana test. For all other persons involved in the Indian Program, the training should be encouraged. Finally, Regions should be ready to work with tribes that request assistance in preparing applications involving Montana test issues.

Adoption and Implementation: We adopt this recommendation in full. The final guidance is attached as Attachment C. We ask that AIEO work with OGC and the Regions to develop a training program as discussed above.

Issue 3b -- Generalized Findings. Should EPA publish a set of generalized findings, to supplement reservation-specific findings, regarding the nature of the pollutants and activities regulated under the environmental statutes and the importance of effective regulation under those statutes?

Recommendation: The Agency should issue in the Federal Register an appropriate set of generalized findings for all relevant programs regarding the seriousness and mobility of pollutants and the importance of environmental regulation to tribal self-governance.

Adoption and Implementation: We adopt this recommendation in full and ask that AIEO and the relevant NPMS in the Office of Water and the Office of Prevention, Pesticides, and Toxic Substances, in consultation with OGC and the Regions, prepare in a timely manner appropriate generalized findings consistent with the Workgroup's recommendation.

Issue 4 -- Stakeholder Involvement: Who are the appropriate entities to comment on tribal water quality standards (WQS) eligibility applications? Should opportunity for comment be provided on supplemental application materials or tentative determinations? This issue is limited to opportunity for comment on a tribe's assertion of jurisdiction.

Recommendation: The current process for review of tribal eligibility to set WQS provides "appropriate governmental entities" (i.e., adjacent states, tribes, and federal agencies) an opportunity to comment on tribal assertions of jurisdiction contained in the initial application from a tribe. In addition, under the current process, notice of availability of a tribal application is provided to other potential commenters, specifying that any comments are to be funneled through "appropriate governmental entities." The Workgroup recommends that EPA supplement this current process by also providing: 1) supplemental application materials to "appropriate governmental entities," 2) a 30-day opportunity for these governments to comment on EPA's proposed findings of fact (under the Montana test) where a tribe seeks program approval over nonmembers on fee lands, and 3) notice of availability of such proposed findings of fact to other potential commenters (with comments to go through "appropriate governmental entities"). The Agency should also ensure that applicant tribes have an opportunity to review EPA's draft proposed findings of fact (under the Montana test) before they are made available to "appropriate governmental entities." EPA should also provide tribes an opportunity to respond to any comments submitted by "appropriate governmental entities."

In addition, EPA should ensure that tribes are given an opportunity to comment on any state application to EPA containing

an assertion of jurisdiction over areas that are in or adjacent to Indian country.

Adoption and Implementation: We adopt this recommendation in full. EPA decisions regarding tribal eligibility to set WQS should proceed consistent with the process detailed above. This expanded process may be implemented without changes to EPA regulations (see 40 C.F.R. § 131.8). Nonetheless, the Office of Science and Technology within the Office of Water, in consultation with AIEO, the Regions and OGC, should explore whether it is advisable for the Agency to incorporate this expanded process into regulation.

Issue 5 -- Eligibility requirements for grants: Ensuring consistent and adequate documentation regarding tribal eligibility for grants (i.e., evaluation of "treatment in the same manner as a state" (TAS) criteria -- federal recognition, substantial duties, jurisdiction, and capability).

Recommendation: EPA should prepare guidance for EPA staff on the TAS considerations unique to grants. The guidance should address issues such as: the jurisdictional component of grant eligibility decisions; tribal authority issues relating to CWA § 319(h) grants; the "reservation" requirement under the CWA; use of CWA § 106 funds for off-reservation activities that relate to the protection of waters within reservations; the capability component of grant eligibility decisions; procedures for documenting eligibility determinations for grants; and internal Agency concurrences required for grant eligibility decisions. The Agency should ensure that appropriate grant and program offices receive copies of the guidance.

Adoption and Implementation: We adopt this recommendation in full and ask that AIEO and the Office of Administration and Resources Management, in consultation with OGC and the Regions, prepare in a timely manner guidance consistent with the Workgroup's recommendation.

Conclusion

We would like to thank all the members of the Workgroup for dedicating so much of their time and energy to reviewing the Agency's process for making tribal eligibility determinations and developing the recommendations and the guidance for improving this process. Also, we would like to thank the Tribal Caucus of the TOC for taking the time to review thoroughly the draft recommendations and for providing the Workgroup with detailed comments. We believe that the recommended changes in the Agency's process, the proposed training programs, and the new guidance will improve the Agency's decision-making process for tribal applications for eligibility to run regulatory programs.

If you have any questions regarding this memorandum, please contact Robert Dreher (202-260-8064) or have your staff contact Tony Hanson (202-260-8106) or Jim Havard (202-260-1003).

Attachments

cc: Senior Indian Managers
Associate General Counsels
Regional Counsels
Tribal Eligibility Workgroup Members
National Indian Workgroup Members
EPA Indian Law Workgroup Members

EPA's Workgroup on Tribal Eligibility Determinations

Workgroup Members

Jim Sappier, Region 1
Nina Dale, Region 2
Christine Yost, Region 2
Samantha Fairchild, Region 3
Wayne Aronson, Region 4
Fred Hunter, Region 4
Bob Springer, Region 5
Ben Harrison, Region 6
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Tom Speicher, Region 8
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EPA's Workgroup on Tribal Eligibility Determinations

Subgroup Members

Process for maintaining and compiling administrative records for determinations on tribal applications for eligibility to run regulatory programs

Rich McAllister, Wayne Aronson, Ben Harrison, Tom Speicher, Leigh Price, Robert Springer, Jim Havard

HQ role in determinations on tribal applications for eligibility to run regulatory programs programs

Betty West, Rosanna Hoffmann, Kerry Clough, Sadie Hoskie, Elizabeth Bell, Jim Havard, David LaRoche

Application of "the Montana test"

Robert Springer, Leigh Price, Tom Speicher, Rich McAllister, Phil Robinson, Tom Hooven, Betty West, Rosanna Hoffmann, Danita Yocom, Rupert Thomas, Phil Metzger, Elizabeth Bell, Tom Wall, Jim Havard

Stakeholder involvement

Sadie Hoskie, Kerry Clough, Joe Ryan, Jim Havard

Evaluating tribal applications to receive grants in the same manner as a state

Ben Harrison, Rich McAllister, Jim Havard, Leslie Darman, Samantha Fairchild, Nina Dale, Maureen Ross



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

ATTACHMENT B

MAR 19 1998

MEMORANDUM

SUBJECT: Administrative Records for EPA Determinations on Tribal Eligibility for Regulatory Programs

FROM: Robert Perciasepe *Bob Perciasepe*
Assistant Administrator for the National Indian Program

Jonathan Z. Cannon *Jonathan Cannon*
General Counsel

TO: Regional Administrators
Regional Counsels

This memorandum describes the procedures that the regional offices are to follow in establishing and maintaining administrative records for EPA determinations on tribal applications for eligibility to run regulatory programs.¹ Because of the large number of determinations on tribal applications for regulatory programs expected over the coming years, and because these determinations can be complex and often are controversial, regional offices are to follow these procedures to ensure that the technical, policy, and legal bases for EPA's decisions are articulated in supporting records that are maintained in an orderly fashion. In addition, we ask that regional offices establish a training mechanism to ensure that the guidance and procedures are followed.

¹ This memorandum addresses EPA determinations on tribal applications for eligibility to run regulatory programs under all relevant statutes; it does not address EPA determinations on tribal grant applications. Although the scope of this memorandum is limited to EPA determinations on tribal eligibility applications for regulatory programs, the procedures and guidance outlined below may be valuable for ensuring sound and defensible decisions regarding other Agency actions affecting environmental programs in Indian country (e.g., PSD redesignations, site-specific rulemakings under RCRA).

We believe that following the procedures outlined below will foster quality decision-making by the Agency and facilitate the public's understanding of EPA's actions. Moreover, in any litigation challenging EPA's decisions, the administrative record serves as the basis for a reviewing court to determine whether the Agency's action complies with the Administrative Procedure Act -- i.e., whether the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (A).

In deciding whether an agency decision is "arbitrary or capricious," the courts generally will be limited to reviewing the Agency's administrative record. Except in very rare circumstances, such review does not allow for testimony or after-the-fact explanations of the Agency's decision. Gaps in the record, including the omission of relevant factual material or the failure to articulate crucial steps in the Agency's reasoning, can result in a finding that the Agency has not complied with the Administrative Procedure Act, causing the court to remand and/or invalidate the Agency's action.

To ensure that the administrative record for EPA's decisions is developed in an orderly fashion, each Region is to establish a system for creating and maintaining an official docket for each determination on a tribal application for eligibility to run a regulatory program. A docket is a single repository for documents that comprise the record for an EPA action. The docket is organized chronologically and by type of document (e.g., correspondence, technical documents); and is updated with new record material as it is generated. Each document is assigned an identification number, and access to the docket is monitored to ensure that documents are not lost or misplaced. The documents are listed in an index as they are received or generated. While maintaining a formal docket involves some level of effort, we find that the resources needed to maintain a docketing system are more than justified because it enables the Agency to identify for decision-makers, the public, and the courts the bases for the Agency's decisions. Moreover, the Agency would need to compile an index to all information relied upon by the Agency in any event where EPA's action is the subject of litigation.

Section I, below, summarizes the general contents of an administrative record and discusses specific elements of an administrative record for tribal regulatory program eligibility decisions. Section II contains procedures regarding the establishment of dockets for such decisions in the regional offices.²

² This memorandum does not address any requirements regarding the retention of documents under the Agency's records retention schedules.

I. Overview of the Administrative Record

The Administrative Record Generally

Below is a general discussion of the elements of an administrative record.

- o The record is a set of documents relied upon by the Agency for its decision. It generally will contain all of the factual material relevant to the Agency's decision, relevant guidance used by the Agency, any comments/correspondence from outside parties and Agency responses, and EPA's explanation of how it arrived at its decision.
- o The record generally should not contain internal documents reflecting the deliberations of the Agency (e.g., briefing documents, legal memoranda, drafts of documents).³ If an internal document contains both factual and privileged information, and the factual information is not otherwise in the record, we can redact the privileged information and include the document in the record.
- o Any documents prepared by EPA that are to be part of the administrative record should be dated and signed (if appropriate).
- o The record may only include documents that are in existence at the time the Agency makes its decision. In any litigation challenging EPA's action, after-the-fact explanations or justifications of EPA's decisions are not permitted except in very rare circumstances. Therefore, all documentation needed to support the decision must be completed when EPA takes its action.

Elements of an Administrative Record on a Tribal Regulatory Program Eligibility Determination

Below is a list and discussion of the specific types of material that should be included in the administrative record for a determination on a tribal regulatory program application.

- o The tribe's application and any post-application information submitted by the tribe.
- o All other relevant correspondence between EPA and the tribe.

³ These documents may, however, be subject to Agency retention schedules.

- o Any letters from EPA transmitting the tribe's application to appropriate governmental entities (i.e., adjacent states, tribes and federal agencies).
- o Any comments or competing claims of jurisdiction received from appropriate governmental entities. Any other comments received on the application from outside of EPA.
- o EPA's response to any comments.
- o In cases where EPA consults with the Department of the Interior regarding its decision, any non-privileged record of such consultation.
- o A decision document signed by the regional official delegated authority to make the decision providing a full explanation of the basis for the regional office's final determination. The Agency's decision document needs to clearly set forth the Agency's process and the data that supported the Agency's decision. The decision document needs to clearly lay out the Agency's determination with regard to each of the treatment in the same manner as a state criteria spelled out in EPA regulations (i.e., federal recognition, government with substantial powers and duties, jurisdiction, and capability).
- o If the determination involves a finding of tribal jurisdiction over the activities of non-Indians on fee lands, the decision document should include a detailed, reservation-specific discussion of existing or potential impacts from such activities on the health, welfare, economic security or political integrity of the tribe (see EPA's Montana-test guidance, dated March 19, 1998).
- o EPA's 1984 Indian Policy and any other Agency policy documents or Agency guidance that may be relevant to the determination.
- o Non-deliberative documents reflecting any required concurrences.
- o Any other non-deliberative materials relevant to the Agency's determination.

II. Establishing and Maintaining a Docket

Each region is to establish a docketing system for determinations on tribal applications for eligibility to run regulatory programs. Below is guidance on the operation of a docketing system. The guidance includes information regarding the general procedures that characterize the operation of a docket. It also contains a discussion of specific issues

relating to dockets for EPA tribal regulatory program eligibility determinations.

General Docketing Procedures

- o Each regional office should identify a location for the docket and personnel that are responsible for overseeing and maintaining the docketing process.
- o Any relevant materials should be forwarded to the docket from Agency personnel as soon as they are available in final form.
- o Docket personnel should enter a copy of each document into the docket, indicating the date on which it was entered into the docket and a number identifying the document.
- o An updated index to the docket should be maintained at all times.
- o When in use for reading or copying, documents in the docket should be checked out to the individual using the documents to ensure that documents are not lost or misplaced. Records should be kept of any outside party that visits the docket.
- o In general, documents relied upon by the Agency must themselves be placed in the docket. However, where a document is readily available to the public (e.g., through public libraries) a reference to the document (e.g., a copy of the title page and table of contents) may be placed in the docket in lieu of an actual copy.

Issues Specific to Tribal Eligibility Determination Dockets

- o The docket should include the tribal application and all supplementary material submitted by the tribe to support the tribe's application.
- o The docket should include all correspondence between EPA and outside parties regarding the tribe's application.
- o As comments are received by the Agency, a copy should be placed into the docket as soon as possible. If comments are received after the close of the comment period, they should be placed in the docket in a separate section entitled "Comments received after the close of the comment period."⁴

⁴ It is the Agency's policy to respond to late comments whenever possible. Any decision not to respond to late comments should only be made after consultation with the Office of

- o The docket should include any responses to comments prepared by the Agency.
- o The decision document explaining the basis for the Agency's decision, along with any other non-deliberative materials relevant to the Agency's decision should be placed in the docket as soon as they are final.
- o Non-deliberative documents reflecting any required concurrences should be placed in the docket.
- o As noted previously, record documents cannot be generated or modified after EPA takes its action.
- o Regions may want to consider establishing a "generic" tribal eligibility determination docket that would include documents (such as EPA's 1984 Indian Policy) that the regional office will rely upon in any tribal eligibility determination rather than including such documents in the docket for each determination.

We hope that this memorandum will assist the Regions in making decisions on tribal eligibility for regulatory programs and in improving EPA's technical, policy, and legal bases for all such decisions.

Regional Counsel.

MONTANA-TEST GUIDANCE

**Making Factual Determinations under the Montana Test:
Tribal Civil Regulatory Authority over Nonmember Activities on
Fee Lands**

NOTICE

The following guidance is intended only for EPA managers and staff in the analysis of tribal assertions of civil regulatory jurisdiction over nonmember activities on fee lands within a tribe's reservation. Specifically, the guidance is intended to assist in the collection and analysis of factual information related to the question of whether or not the activities of nonmembers on reservation fee lands may have serious and substantial effects on the "political integrity, the economic security, or the health or welfare of the tribe." Montana v. United States, 450 U.S. 544, 566 (1981). Because of the importance of EPA's determinations in this area, it is very important that all readily-obtainable factual information be available to EPA managers in order to make properly-informed decisions.

The following guidance should be viewed as offering suggestions only. The guidance is based upon the experience of the Agency to date and offers suggestions on questions to ask and various types of information that, if available, may be helpful to the Agency in making jurisdictional determinations. The guidance does not establish any requirements. In particular, it does not establish any requirement that any specific information or category of information listed here is necessary in order to determine that nonmember activities either do or do not have the impacts on the tribe necessary to warrant tribal regulation of those activities. The determination of the sufficiency of information is a matter of the expert and professional judgment of the decision-maker based on the facts of the particular application, and cannot be reduced to guidance of this nature.

Background

In their applications for eligibility to implement a number of EPA programs, tribes must demonstrate that they have sufficient jurisdiction to enforce tribal laws over the areas covered in the application, including, where appropriate, civil regulatory jurisdiction over nonmember activities that may occur on any nonmember-owned fee lands located on a tribe's reservation. The Supreme Court has set forth a legal test for determining whether a tribe has jurisdiction over nonmember activities on fee lands, called the "Montana Test."

The Montana Test establishes that a tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana v. United States, 450 U.S. 544, 566 (1981).

In 1991, EPA decided that it would apply a more rigorous formulation of the Montana Test by establishing an "operating rule" that requires tribes seeking eligibility to set water quality standards governing the activities of nonmembers on fee lands to show that the effects are "serious and substantial."¹ At the same time, EPA published its finding that the behaviors regulated under the Clean Water Act (CWA) tend to have serious and substantial effects on human health and welfare (and, thus, the CWA regulates them). EPA also announced that it would require tribes seeking eligibility to set water quality standards governing the activities of nonmembers on fee lands to provide facts, on a case-by-case basis, demonstrating that water pollution from nonmember fee land sources has or may have serious and substantial effects on the health or welfare of tribal members under the particular conditions of the tribe's reservation.

¹ EPA noted in 1991 that "[t]he choice of an Agency operating rule containing this standard is taken solely as a matter of prudence in light of judicial uncertainty and does not reflect an Agency endorsement of this standard per se." Since 1991, however, the Supreme Court has reaffirmed Montana's impacts test in 1993 (Bourland) and again in 1997 (Strate), both times quoting the Montana impacts test verbatim without addressing the need for "serious" or "substantial" impacts. While it appears that the Montana Test does not require "serious and substantial" impacts, for the time being, as a matter of prudence, EPA will continue to look to see whether such impacts exist when evaluating tribal authority under the Montana Test.

The Agency now has several years of experience in reviewing tribal applications for EPA programs that involve an assertion of tribal jurisdiction over nonmember activities on fee lands. The Agency's experience shows that it is important for the Agency to be consistent in its application of the Montana Test. To help ensure national consistency in the Agency's process for making determinations under the Montana Test, the following factors should be considered.

Guidance

A. What types or categories of facts may be relevant to a determination of whether pollution generated on nonmember fee lands may have a deleterious effect on tribal health or welfare or the tribe's political integrity or economic security? The following questions should be considered:

(1) Is pollution being produced on nonmember fee lands, or may it be/is it likely to be produced? Are there facts showing that pollution is presently being produced on nonmember fee lands within the reservation? If no pollution is presently being produced, are there circumstances showing that new pollution sources may be established in the future that may have impacts on tribal health, welfare, political integrity, or economic security? The threat of such impacts is a reasonable basis for a tribal government to establish controls intended to prevent harm from occurring in the first place. Thus, any information regarding present or potential pollution sources on nonmember fee lands should be considered.

(2) Are tribal members or resources exposed, or may they be/are they likely to be exposed to the pollution? Are there facts showing, not only that pollution is occurring or may occur, but that tribal members may be exposed to the pollution? For example, such exposure can occur if pollution is carried from nonmember lands due to the ambient nature of air and water. Tribal members may be exposed to the pollution when they are on nonmember fee lands. Pollution can also be carried through the food chain or drinking water supplies. Any facts relating to the means by which tribal members are or might be exposed to pollution should be considered. Are there facts showing that resources upon which tribal members depend (e.g., air, water, plants and animals) are or may be exposed to pollution?

(3) Does the exposure to the pollutants affect or have the potential to affect tribal politics, economics, health or welfare? Are there facts or studies supporting a showing that, if exposed to the pollutants generated on nonmember fee lands, tribal members may suffer deleterious effects on their "political integrity, economic security or health or welfare?" Effects on "political integrity" and "economic security" may occur when tribal members, or species or resources on which tribal members depend, are exposed. For example, the tribe may depend economically upon the consumption or commercial sale of fish, and protection of the fish resource depends upon effective protection of the resource habitat. Are the impacts to tribal members serious and substantial?

- B. Do the facts relating to a Montana Test analysis differ from program to program or under different environmental statutes? Yes. Again, the purpose of this guidance is simply to suggest questions to ask and possible areas to investigate to ensure that as many of the relevant facts are before the EPA decision-maker as are reasonably available. The types of pollutants may vary from program to program. Similarly, the route of exposure often may vary from program to program.
- C. How detailed should the Montana Test analysis be? Any factual data readily available to the tribes, EPA and any other commenters, such as state or local governments, businesses and private citizens, might be considered. One approach would be to use the information provided in the tribal application, and information provided by external commenters and by an EPA review of the literature and relevant information in Agency files. In order to base Montana-Test decisions on as much relevant information as is reasonably available, Agency staff should do the best job that can reasonably be done in thoroughly substantiating their recommendations with available facts and studies. A "best reasonable effort" would not ordinarily require EPA Regions to carry out or contract for original research.
- D. Should Montana-Test determinations address how regulation of nonmember water-polluting activities is necessary to effective tribal "self-governance?" This issue arises as a result of a discussion of impacts on self-government by the Supreme Court in it's 1997 decision in Strate v. A-1 Contractors. The Agency determined in its 1984 EPA Indian Policy that "the principle of Indian self-government" appropriately includes such governmental functions as "setting standards, making environmental policy decisions and...carrying out program responsibilities affecting Indian

reservations, their environments, and the health and welfare of the reservation populace." The tribal governments' views on this issue are particularly important. It will greatly assist the Agency in making Montana-Test determinations if the applicant tribal government would also give its reasoning and basis (including any supporting facts) for concluding that effective self-government includes enabling the tribe to carry out the program for which it is applying.

- E. Should EPA consider a tribe's treaty rights or other similar rights embodied in statutes or executive orders in making its determinations?** The applicant tribe may have signed a treaty with the United States in which the United States has guaranteed rights that are clearly tied to tribal politics, economics, health or welfare. While this information does not in and of itself demonstrate that nonmember activities may impact the tribal interests recognized in the Montana Test, it may be relevant to the analysis of whether there are impacts that are serious and substantial and a threat to effective self-government.
- F. At what point should Regional management and staff seek input and advice from Headquarters in making Montana Test determinations?** National Program Offices, the Office of General Counsel and the American Indian Environmental Office can all provide important assistance and advice, based upon the Agency's experience in addressing the issues encountered in evaluating tribal assertions of civil regulatory authority over nonmember activities. This body of Agency experience is constantly growing, and informed by new federal court decisions applying the Montana Test. In order to benefit from the most current and relevant information, Regions should coordinate closely with Headquarters' offices and seek Headquarters concurrence on applications raising nationally-significant issues. This coordination should begin as early in the process as possible, such as upon notice that a tribe is interested in pursuing regulatory authority over nonmembers on fee lands, and no later than when individual tribal applications are received in the Regional Office.